Supreme Court, U.S.
FILED

97 1816 MAY 11 1998

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAMES H. NEAL,

Petitioner,

v.

DISTRICT OF COLUMBIA
and
JOHN LATTIMORE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 11, 1998

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18 pp

QUESTIONS PRESENTED

1. Under *Sandin v. Conner*, 515 U.S. 472, 487 (1995), do prison rules create a constitutionally-protected liberty interest against administrative segregation if this confinement is (a) significantly more restrictive than housing in the general prison population; and (b) atypical, because neither it nor any similarly-restrictive confinement may be imposed on a discretionary basis?

2. Did the court below err in holding that prison rules can never create a liberty interest against any increased restraint that is "comparable" to the deprivation in *Sandin*?

PARTIES BELOW

The parties to the proceeding in the U.S. Court of Appeals for the District of Columbia Circuit were James H. Neal, plaintiff-appellant, and John W. Lattimore and the District of Columbia, defendants-appellees.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears in the appendix ("App.") at 1a-8a and is reported at 131 F.3d 172. It is the only reported opinion. The district court's unreported opinions holding that local prison rules create a constitutionally-protected liberty interest appear at App. 17a-22a and 24a-40a. The district court's unreported opinion dismissing petitioner's complaint appears at App. 11a-15a.

JURISDICTION

The judgment of the court of appeals was entered December 16, 1997. The court's order denying rehearing was entered on February 9, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The applicable provisions, set forth in the appendix, App. 47a-54a, are the Due Process Clause, U.S. Const. amend. V; 42 U.S.C. §1983; and numerous legislatively-approved District of Columbia prison rules published in title 28, District of Columbia Municipal Regulations (DCMR).

STATEMENT OF THE CASE

Petitioner Neal, a medium-custody District of Columbia prisoner, filed in the district court a suit for damages under 42 U.S.C. § 1983. The court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). Neal claimed that prison officials had violated his Fifth Amendment right to due process by denying him immediate release on demand from voluntary protective custody, as prison rules required, thereby causing

him to suffer involuntary maximum-custody confinement for many months, without a finding of clear and present threat to his safety, as prison rules also required.

The district court held the prison rules create a constitutionally-protected liberty interest against confinement in involuntary protective custody, but dismissed the complaint pending determination by local courts whether the rules create a private right of action. The court of appeals rejected this reasoning, but affirmed the dismissal of the complaint. The appellate court held the prison rules do not create a liberty interest.

Facts

In March 1992, upon his arrival at the Lorton Maximum Security Facility from a federal institution, Neal chose to enter voluntary protective custody, a type of administrative segregation. On December 1, 1992, Neal requested in writing that he be released from protective custody into the general prison population. The applicable prison rule, 28 DCMR § 521.12 (1987), states:

> If a resident in voluntary protective custody provides ... a written statement that the resident no longer wishes to remain in protective custody, the resident *shall be released at once* from protective custody; Provided, that a resident who requests such release may be placed in involuntary protective custody under the provision of this chapter for such involuntary placement. [Emphasis added.]

Prison officials, however, ignored Neal's request for release from voluntary protective custody. Thus, they subjected him to *involuntary* protective custody. Under § 520.4 of the rules, a Lorton prisoner is "subject to placement in involuntary custody" only if the prisoner "is found to be in danger from a

clear and present threat to the resident's safety." Prison officials held Neal in involuntary protective custody for more than six months after December 1, 1992, without any finding that he faced "a clear and present threat" to his safety.

In the district court Neal proved, App. 67a, 72a-73a, and the court found, that his conditions of confinement in administrative segregation were "more restrictive ... than those in the general population" of the Lorton Maximum Security Facility and that "the conditions imposed on Plaintiff represented a significant deprivation from the conditions in the general population." App. 25a, 20a. The court of appeals already had so held in a previous case. *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner").

Neal also showed that the prison rules do not allow Lorton officials to impose any similarly restrictive confinement on a discretionary basis. Under the rules, any restrictive confinement in a maximum security cell is either disciplinary or administrative segregation. §§ 505.2, 521.3. This segregation may not be imposed unless a specific substantive standard is met.[1]

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[1] Involuntary protective custody may be imposed only where "factual information" shows a "clear and present threat to the resident's safety." §§ 526.1 and 520.4. Prisoners in voluntary protective custody have the right to immediate release on demand. § 521.12. Other types of administrative segregation may be imposed only if factual information establishes one of two other circumstances ("definite escape risk" or "clear and present danger to the safety of others"). §§ 520.2, 520.3. Disciplinary segregation may be imposed only if factual information demonstrates that a prisoner has committed a specific disciplinary offense. § 500.

District Court Decision

Based on (1) the finding of "significant deprivation," (2) the right under the rules to immediate release from voluntary protective custody upon request, and (3) the rules' substantive restrictions on imposition of involuntary protective custody, the district court held that Neal had a liberty interest against confinement in involuntary protective custody and that prison officials had violated due process by confining him in involuntary protective custody for over six months without the finding required by the rules. App. 18a-21a. The district court rejected defendants' argument that *Sandin v. Conner*, 515 U.S. 472 (1995), precluded this holding. *Id.*

The district court, however, abstained from determining Neal's entitlement to damages. The court believed that his right to recover damages for the constitutional violation depended on whether local law recognizes a private right of action for damages under the prison rules. The court held the entire case should be dismissed without prejudice to enable Neal to seek determination of this question in the local courts. App. 14a-15a.

Court of Appeals Opinion

The court of appeals rejected the district court's reason for dismissing the case, App. 5a, but held that, under *Sandin*, the prison rules do not create a liberty interest. The court said the deprivation Neal had suffered when he was not released from protective custody into the Maximum Security Facility general population was "comparable to that at issue in *Sandin*." App. 7a. Though Neal's restrictive confinement had lasted more than six months, while the prisoner in *Sandin* had been segregated for only thirty days, the court found the two deprivations comparable because the degree of deprivation in *Sandin* had been greater.

The court based its holding solely on comparison of Neal's confinement to conditions in the Maximum Security Facility general population--the same comparison the district court had made, albeit with the opposite result. The court of appeals acknowledged, though, that the prison Classification Board had "recommended that Neal be moved to medium security custody." App. 3a. In the companion case, *Brown v. Plaut*, 131 F.3d 163 (1997), the court of appeals held that *Sandin* did not preclude a finding that medium custody Lorton prisoners have a liberty interest against transfer to administrative segregation in the Maximum Security Facility. Neal's rehearing petition, in addition to defending the district court's finding, pointed out that the court had overlooked this similarity in the situations of Neal and Brown.

In *Brown*, the court declined to decide the *Sandin* issue. It said that *Sandin* was "not clear," that its application "presents a number of difficulties" and "unsettled questions," that analysis in case law from the Second and Ninth Circuits has not been adopted by the Fifth Circuit, and that the Seventh Circuit has said that it would "welcome clarification" by the Supreme Court. 131 F.3d 169-170, *quoting Wagner v. Hanks*, 128 F.3d 1173, 1176 (7th Cir. 1997).

REASON FOR GRANTING THE WRIT

The holding below that prison rules cannot create a liberty interest against any increase in restraint that is comparable to the deprivation in *Sandin* misconstrues the *Sandin* holding and conflicts with the decisions of other circuits.

Contrary to the decision below, *Sandin v. Conner*, 515 U.S. 472 (1995), did not hold that a liberty interest created by law or rule must be one of various combinations of increases in degree and duration of restraint that are deemed--

somehow--sufficient to warrant constitutional concern. *Sandin* did not hold, for example, that thirty days' solitary confinement can never be a deprivation of liberty. The Court did not suggest that there is some minimum number of solitary confinement days greater than thirty that crosses a constitutional threshold for finding a liberty interest.

Nor did *Sandin* hold that courts should make rough comparisons of various combinations of increases in degree and duration of restraint--such as a six-month change from 30 per cent solitary confinement to 80 percent solitary confinement, compared to a thirty-day change from 30 per cent solitary confinement to 100 per cent solitary confinement--to determine whether the two increases are "comparable," and whether the particular increase at issue crosses an unspecified due-process-triggering threshold. *Sandin* involved no such analysis. The "comparability" analysis invented by the court below is erroneous--and absurd.

The proper analysis is found in the *Sandin* opinion. There, the Court held that a prisoner in Hawaii did not have a constitutionally-protected liberty interest against confinement in disciplinary segregation because, under Hawaii law, disciplinary segregation was not an "atypical, significant deprivation" of liberty. 515 U.S. at 486. The Court based this holding on two findings.

First, disciplinary segregation in Hawaii "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* Second, under Hawaii law, imposition of administrative segregation or protective custody was "totally discretionary." *Id.* Thus, since disciplinary segregation in Hawaii prisons "did not exceed similar, totally discretionary confinement," *id.*, the

Hawaii regulations on disciplinary segregation were "not designed to confer rights on inmates." *Id.* at 482.[2]

The rule adopted in *Sandin* compares challenged confinement to conditions prevailing in the most restrictive type of confinement that prison officials lawfully may impose in exercise of unfettered discretion. Under the Hawaii regulations in *Sandin* the most restrictive but totally discretionary confinement that prison officials could impose was administrative segregation and protective custody. Therefore, conditions in administrative segregation and protective custody were the proper bases for comparison. Since disciplinary segregation in Hawaii "mirrored" and did not "exceed" to any significant degree the restrictiveness of administrative segregation and protective custody, the *Sandin* Court held that Hawaii regulations defining circumstances warranting disciplinary segregation created no liberty interest, because prison officials could impose the same degree of confinement, though under different names, through exercise of unfettered discretion. *Id.* at 486.

Sandin was a straightforward application of the holding and reasoning of *Meachum v. Fano*, 427 U.S. 215, 228 n.4 (1976) (no liberty interest against prison transfer where "no ... law stripped officials of the discretion to transfer prisoners ... 'for whatever reason or for no reason at all' "). 515 U.S. 478-

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[2] The *Sandin* holding was not based on comparison of the degree of confinement in disciplinary segregation to that in the general population in Hawaii prisons. Though the Court mentioned general population conditions, 515 U.S. 486 n.8, the Court's holding was that there could be no liberty interest against imposition of disciplinary segregation where this segregation "mirrored" and did not "exceed" to *any* significant degree "totally discretionary" administrative segregation and "totally discretionary" protective custody.

79. While following *Meachum*, *Sandin* expressly reaffirmed *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state law created liberty interest against imposition of prison discipline revoking prison good time credits, where credits "were revocable *only* if the prisoner was guilty of serious misconduct") (emphasis added). 515 U.S. 477-78.[3]

The prison rules here are like the state statutes in *Wolff*, not the provisions in *Meachum* or *Sandin*. Unlike the Hawaii regulations in *Sandin*, the rules here do *not* allow Lorton officials to impose *either* disciplinary segregation, administrative segregation, *or* protective custody on a "totally discretionary" basis. Under the Lorton rules *none* of these types of restrictive confinement may be imposed unless a specific substantive standard is met.[4] In contrast to the finding in *Sandin* that Hawaii regulations did not confer rights on prisoners, the District of Columbia Court of Appeals consistently has held that the Lorton rules do confer rights on Lorton prisoners. *Abdullah v. Roach*, 668 A.2d 801 (D.C. 1995); *Vaughn v. United States*, 598 A.2d 425 (D.C. 1991). In *Abdullah*, moreover, the court expressly observed that the District of Columbia "may be reading *Sandin* too broadly." 668 A.2d at 809.

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[3] The facts and holding in *Sandin* were similar to those in *Abbott v. McCotter*, 13 F.3d 1439 (10th Cir. 1994), where, as in *Sandin*, restrictive confinement identical to that challenged could be imposed on a totally discretionary basis. The *Abbott* court, a year before *Sandin*, reached the same conclusion announced in *Sandin*--prison regulations cannot create a liberty interest against a particular kind of confinement where equally restrictive conditions can be imposed on a totally discretionary basis.

[4] See n. 1, *supra*.

Since Lorton officials may remove prisoners from the general prison population *only* where a specific substantive standard is met, the proper base of comparison under the *Sandin* rule--to determine whether the Lorton prison rules create liberty interests against administrative or disciplinary segregation--is the restrictiveness of confinement in the Lorton general population.[5] Under the *Sandin* rule the question here is whether administrative segregation "mirrors" and does not "exceed" conditions of confinement for the general prison population.[6]

At Lorton, confinement in disciplinary or administrative segregation clearly "exceeds" and does not "mirror" the restrictivness of conditions in the general prison population. *Crosby-Bey v. District of Columbia*, 786 F.2d 1182, 1183 (D.C. Cir. 1986) ("[b]oth disciplinary segregation and administrative segregation involve a substantial loss of liberty for the prisoner"). The district court expressly and properly found, on the undisputed facts, App. 67a, 72a-73a, that Neal's unlawful confinement in involuntary protective custody was a "significant deprivation." App. 20a.

The court of appeals misconstrued *Sandin* when it rejected Neal's due process claim on the ground that the deprivation of his liberty was "comparable to that at issue in *Sandin*." In

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[5] The *Abdullah* court noted this point. 668 A.2d at 809 n. 13.

[6] Even Lorton officials' discretion to house prisoners within the general population is not totally unfettered. Lorton prisoners have a right to proper custody classification to determine in *which* population they should be housed--the minimum, medium, or maximum custody population. *Verrett v. Stempson*, 623 A.2d 120 (D.C. 1993).

Sandin, there was no deprivation of liberty *at all* because the disciplinary segregation at issue "mirrored," and did not "exceed," administrative segregation that Hawaii prison officials could impose on a "totally discretionary basis." Under the Lorton rules, in contrast, prison officials cannot impose *any* segregation from the general prison population on a "totally discretionary basis." The deprivation of Neal's liberty exceeded, and did not mirror, the confinement that the officials had unrestricted discretion to impose.

Several post-*Sandin* decisions reject the holding of the court below and support the validity of petitioner's due process claim. *Brooks v. DiFasi*, 112 F.3d 46 (2d Cir. 1997) (confinement exceeding totally discretionary confinement and imposing a significant hardship requires due process); *Miller v. Selsky*, 111 F.3d 7 (2d Cir. 1997) ("*Sandin* did not create blanket rule that disciplinary confinement may never implicate a liberty interest"); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (*Sandin* requires due process where there is a major difference between segregation and housing in the general population); *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995) ("*Sandin* implies that states may grant prisoners liberty interests in being in the general population ... if the conditions of confinement in segregation are significantly more restrictive that those in the general population"); *Thomas v. Newkirk*, 905 F. Supp. 580 (N.D. Ind. 1995) (denying motion to dismiss due process challenge to disciplinary segregation; under *Sandin*, prison regulations may create liberty interest against even a short period of disciplinary or administrative segregation; where "regulation proscrib[es] segregation absent specified predicates" whether segregation is atypical and significant hardship depends on "evidence as to the conditions of the various types of segregation [and] that of the general population"); *Lee v. Coughlin*, 902 F. Supp. 424 (S.D.N.Y. 1995) (awarding summary judgment and damages to prisoner held in lengthy administrative segregation on

assault finding reached in violation of due process; under *Sandin*, regulations created liberty interest). Under these precedents, and a proper analysis of *Sandin*, the Lorton prison rules create a liberty interest against confinement in involuntary protective custody.[7]

While this conclusion follows directly from the opinion in *Sandin*, the court below correctly noted, in the companion case, that the courts of appeals have divided on the issue:

> Caselaw from the Second and Ninth Circuits suggests that whether a term in segregation amounts to an "atypical and significant" deprivation turns on its length and on a comparison of conditions in segregation and in the prison's general population. *See, e.g., Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Other courts have not adopted so structured an analysis; for instance, the Fifth Circuit has concluded that a term in administrative segregation was not "atypical and significant" without discussing conditions in the segregation unit or the length of the segregation at all. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995), *cert.*

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[7] This point is dispositive of Neal's constitutional claim, since the deprivation of his liberty occurred without any hearing or findings, and was supported by no evidence. Due process, at the very least, requires a meaningful opportunity to be heard and a determination, based on evidence, of whether the substantive condition for restricting liberty is met. *Superintendent, Mass. Correctional Inst., Walpole v. Hill*, 472 U.S. 445, 455 (1985) (in "variety of contexts" Court has held "loss of an important liberty interest violates due process if the decision is not supported by any evidence"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'").

denied, 116 S. Ct. 1690 (1996). Were we to follow the approach of the Second and Ninth Circuits, we would then need to decide whether the length and severity of the deprivation Brown experienced sufficed to render that deprivation "atypical and significant," a close and difficult question. *Compare Sealey v. Giltner*, 116 F.3d 47, 51-52 (2d Cir. 1997) (remanding for specific findings on conditions of confinement in the case of an inmate held in administrative segregation for six months) with *Mackey v. Dyke*, 111 F.3d 460, 463 (6th Cir.), *cert. denied*, 139 L. Ed. 2d 84, 118 S. Ct. 136 (1997) (finding that a six-month term in administrative segregation was not "atypical and significant," with no discussion of conditions in segregation).

Brown v. Plaut, 131 F.3d 163, 170 (D.C. Cir. 1997). The Court should resolve this conflict among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 11, 1998